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Via Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S. W.
Washington DC 20554

Re: Notice of Ex Parte Presentation, In re Requests for Review by Consorcio de Bibliotecas y Escuelas de Puerto Rico ("Consorcio") of Decisions of Universal Service Administrator ("Requests for Review");
CC Docket Nos. 96-45, 97-21, and 02-6.

Dear Ms. Dortch:

On February 25, 2004, Messrs. Gregory Rohde and Christopher McLean, principals of E-Copernicus, and I representing Hispanic Information and Telecommunications Network, Inc. ("HITN"), met with William Maher, Chief, Wireline Competition Bureau ("WCB"), Carol Matthey, Deputy Bureau Chief, WCB, Paul Garnett, Legal Counsel to the Chief, WCB, Eric Einhorn, Chief, Telecommunications Access Policy Division, WCB, and Narda Jones, Deputy Chief, Telecommunications Access Policy Division, WCB, to discuss matters related to the above-referenced Requests for Review. The discussions specifically related to issues outlined in the attached written presentation as well as the summary outlined below.

HITN is a non-profit educational organization dedicated to improving the lives of Hispanic Americans by using advanced telecommunications technologies to bring educational programming, Internet access and wireless communications to underserved communities. HITN has been a participant in the E-rate program since its inception. HITN is a service provider to Consorcio members in the Commonwealth of Puerto Rico. Consorcio members are primarily private schools and municipal libraries located in some of the poorest and most rural areas of the Commonwealth. During the first three years of the program, HITN and the Consorcio encountered few problems with the E-rate program. Since year 4 of the program, the Consorcio and HITN have encountered difficulties with the E-rate program.

A summary of the key issues discussed and raised in the HITN and Consorcio filings are highlighted below (citing relevant year):

1.) The FCC has more than adequate grounds to grant the Consorcio's Year 4 Appeal

The Consorcio's Year 4 Appeal should be granted. In changing the procedures or rules for filing E-rate applications, without proper notice or review by the Office of Management and Budget, the SLD violated the Paperwork Reduction and Administrative Procedures Acts. An English language website change does not provide sufficient notice to Spanish speaking applicants. The Consorcio met the electronic filing deadline and submitted the written forms in conformance with prior year procedures. In the alternative, the FCC should consider waiving the requirement in this case given the fact that the Puerto Rico is a Spanish speaking Commonwealth of the United States; the Consorcio and HITN serve some of the poorest, most digitally disconnected and most rural citizens of the Commonwealth. The SLD English language website simply does not provide fair notice to members of the Consorcio.

There are several factors, which distinguish the Consorcio/HITN case from other deadline cases previously and currently before the Commission.

- The Commonwealth of Puerto Rico is the only part of the United States to have Spanish as its official language. The United States has historic, legal and public interest obligations to the people of Puerto Rico (some dating back to the Treaty ending the Spanish American War), to make services available in Spanish to citizens of Puerto Rico. Unlike the FCC, the SLD does not accommodate Spanish-speaking Americans and did not provide crucial deadline and changed application filing information to Puerto Rican applicants in Spanish.
- Unlike other deadline cases, HITN, as service provider to the Consorcio, continued to provide E-rate services to the Consorcio members. HITN has only collected the local share for these services. The Consorcio schools and libraries in fact received services for which HITN and the Consorcio are seeking reimbursement. To rule against HITN and the Consorcio in a case where there was a clear failure by SLD to follow the notice procedures would impose serious hardship on a non-profit organization dedicated to serving the education needs of many of Puerto Rico's poorest, most remote and rural communities.
- There is no record establishing that a letter advising of the rule change ever reached the Consorcio or its members. Even if a letter had been delivered, it would have been in English and insufficient to fairly notice Spanish speaking Puerto Rican applicants of such a significant change of procedure. Further, even if a letter was in fact received *and understood* by some Consorcio members, the SLD and Commission cannot assume that all Consorcio members knew about the change.
- The record establishes that the electronic deadline was met; the procedure followed by the Consorcio would have complied with the rules as they existed in the previous years and an insignificant amount of time elapsed between the actual postmark date and the improperly noticed postmark date for Year 4.

- Some Year 4 rule changes appear to have been cleared by the Office of Management and Budget, but the crucial, significant and material deadline change was not.

2. Year 6 Appeal at the SLD is Ready for Disposition

HITN discussed two issues regarding the Year 6 Consorcio appeal pending at the Schools and Libraries Division (“SLD”). Now that those issues are resolved, SLD should make a favorable decision on the appeal.

The first issue concerns whether HITN is an authorized common carrier, eligible to provide telecommunications services under the E-Rate program. The Consorcio demonstrated in its appeal that HITN is an authorized common carrier and filed copies of HITN’s FCC satellite common carrier licenses with its appeal. The SLD subsequently requested that HITN file its Form 499A with the Universal Services Administrative Company (“USAC”). Because HITN is a non-profit entity serving non-profit entities and because HITN generates “de-minimis” revenues, HITN is not required under FCC rules to file a Form 499A. However, to accommodate the SLD request, HITN filed its Form 499A for Year 2002 on February 11, 2004 with USAC, for which HITN reported zero revenue from the provision of telecommunications services during Year 2002. HITN has prepared and filed all quarterly Form 499Qs for Year 2003 with the Universal Service Administrative Company (“USAC”) on February 20, 2004. HITN furnished Narda Jones copies of these filings and has notified Cynthia Schultz of the SLD that the filings were completed and filed with USAC.

The second issue with respect to the Year 6 appeals at SLD concerns HITN’s contract with the Year 6 Consorcio customers that applied for E-Rate funds. SLD has requested that HITN provide copies of its agreements with three of the Consorcio institutions for Year 6. HITN referred the matter to the Consorcio’s counsel, Ramsey Woodworth, who replied to the SLD and furnished HITN invoices forwarded to three of the Consorcio institutions for Year 6 services that are being provided by HITN on a month-to-month basis, as permitted by SLD rules. In this instance, no written contract is necessary or required by SLD rules or policies in the case of the provision of month-to-month telecommunications services, and the SLD has been provided with sufficient documentation to demonstrate HITN’s provision of telecommunications services on a month-to-month basis to the Consorcio entities.

Both issues regarding the Year 6 appeal are resolved and a positive decision on the appeal is appropriate at this time.

3. Year 5 Applications Were Improperly Denied Based on Underlying ROFR Provision in 1998 HITN-Consortium Contract

HITN briefly discussed the right of first refusal (“ROFR”) provisions in the 1998 Master Services Agreement between HITN and the Consorcio and indicated that the SLD erred in its determination to deny Year 5 funding to Consorcio applicants because of the

presence of the ROFR provision in the Agreement. HITN also requested the Commission consider the following issues before reaching a final disposition of this matter.

The ROFR in no way could have constituted a competitive bidding violation by the Consorcio member institutions applying for Year 5 funding – the principal reason cited by SLD in its denial of the applications – for several reasons (in addition to those already cited by the Consorcio in its Request for Review of the SLD decision, filed with the Commission on January 23, 2004).

First, there is no evidence that the ROFR provision in the underlying Master Services Agreement was even known to any bidder or prospective bidder. Without knowledge, the term can have no effect on the bidding by other interested bidders. A disappointed, unsuccessful or discouraged bidder never raised the ROFR issue. It was raised for the first time in the Year 5 rejection letter by SLD.

Second, nothing in the Telecommunications Act of 1996, the FCC Rules, the SLD and E-Rate rules, guidelines or precedents that expressly prohibits or discourages ROFR provisions. If the FCC or SLD are to institute a policy on this matter, it must provide applicants, bidders and vendors sufficient notice to conform existing and future contracts and not operate as a “surprise” disqualification of properly prepared and highly audited applications.

Third, there is nothing in a ROFR term that undermines competitive bidding. A right of first refusal provision only serves to allow a losing bidder holding the ROFR to match the lowest bid accepted by the applicant, guaranteeing that the entity seeking bids receives the lowest possible price from either bidder. It also ensures that the applicant has an opportunity to select the highest quality service for the lowest possible price.

Fourth, virtually no entities demonstrated an interest in servicing Consorcio members in the first five years of the program. The Consorcio competitively bid its request for services each of the first 5 years of the E-Rate program in Puerto Rico and received virtually no competing bids, as there was seemingly no other service provider(s) that could (or desired) to provide services to the Consorcio institutions, which are located in some of the most remote and mountainous regions of Puerto Rico – so even if this provision could have been construed by the Consorcio in some way that would effect its decision to select another bidder, that was not the case here since there were no other bidders.

Fifth, in Year 6 an alternative provider entered the bidding process for the first time in the case of the Consorcio’s participation in the E-Rate program. Year 6 (for which there is an appeal pending at SLD for Consorcio applications denied by SLD for reasons discussed above), was the first year a bona-fide alternative bidder made a proposal to the Consorcio to provide Internet access services. The fact that the alternative bidder entered the bidding competition after five years demonstrates that the ROFR did not serve as a short term or long term impediment to competitive bidding.

Sixth, the ROFR has never been exercised. In Year 6, the Consorcio selected the alternative bidder and HITN did not exercise its right of first refusal – thus demonstrating that the SLD rationale in this case regarding Year 5 is wrong from the standpoint of both whether the Consorcio would be disincentivized to select another bidder or that another bidder would be disincentivized from bidding where an incumbent service provider holds a right to match a competing offer.

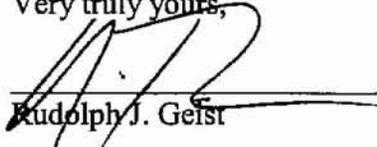
Even if the Commission determines that a right of first refusal provision in an agreement between an applicant and its service providers under the E-Rate program may serve to “dampen competition” and “compromise selection of the vendor”, in this case the provision had no such effect, and was in fact proven both to not have been a factor in the Consorcio’s decision to select a service provider other than HITN in Year 6, and to not affect HITN to exercise its the right of first refusal. HITN has no complaint if the ROFR were prohibited prospectively. To apply it retroactively, especially under the factual circumstances discussed herein would be a grave injustice.

Conclusion

As a non-profit entity providing distance learning, public interest television and educational services to the Hispanic community, HITN is committed to do everything it can to serve the children of Puerto Rico. The barriers to funding that have been placed before the Consorcio and HITN are imposing heavy financial burdens on HITN. HITN has provided quality services to poor, rural and remote areas of Puerto Rico. We urge the FCC and SLD to act in the public interest to release E-rate funds to the Consorcio so that HITN can be fairly compensated for the quality services that have been provided under very difficult circumstances.

This letter is being filed electronically for inclusion in the above-referenced dockets pursuant to Section 1.1208 of the Commission’s rules, 47 C.F.R. §1.1208. To the extent this Notice is not considered timely filed, we hereby request a waiver of the requirement and further request that the Commission accepts this Notice for filing as this matter has not been contested by any party.

Very truly yours,


Rudolph J. Geist

cc (via e-mail):

William Maher
Carol Matthey
Paul Garnett
Eric Einhorn
Narda Jones
Jose Luis Rodriguez
Gregory Rhode
Christopher McLean
Jessica Rosenworcel
Scott Bergmann
Daniel Gonzalez
Christopher Libertelli
Matthew Brill
George McDonald
Cynthia Schultz

Attachment

HITN RECENT (PAST 4 YEARS) EXPERIENCE WITH E-RATE PROGRAM

Presented to Federal Communications Commission, February 5, 2004

(updated from October 2003 version)

E-Rate Funds Applicant(s): Consorcio de Escuelas y Bibliotecas de Puerto Rico
(CEBPR) Member Institutions

Service Provider: Hispanic Information and Telecommunications Network, Inc. (HITN);
SPIN # 143006644

Program Funding Years: 4, 5, 6 & 7

Introduction

Since 1998, HITN has been providing advanced telecommunications and Internet access services and equipment to many of the nation's poorest K-12 private schools and libraries located throughout some of the most remote regions of Puerto Rico. Broadband Internet access and distance learning services are being provided by HITN to schools and libraries using an advanced satellite based transmission medium developed by HITN specifically tailored to serve customers located in the dense foliage and mountainous terrain that are characteristic of Puerto Rico.

Notwithstanding that HITN's school and library customers' have not received any E-Rate funding from SLD during the past 3 program years and therefore have been unable to make payment to HITN of the E-Rate subsidized portion under service agreements with HITN (which in most cases equals 90%), HITN has continued providing services to these entities, funding the continuation of the services from other sources within the organization. Inaction regarding present appeals on file with the Commission and with respect to qualified applications on file the SLD has created major uncertainty for the institutions (many of which have not begun receiving any services) and unfair and difficult financial strain on HITN. As service provider to many of the CEBPR institutions, HITN requests the Commission promptly address the following problems encountered by HITN and its customers over the past 3 years of their participation in the E-Rate program, and provide these institutions with the appropriate relief so they may continue deriving the benefits to which they are entitled under this program.

The following summarizes the problems faced by HITN and its customers over the course of each of the past 3 E-Rate program years:

Program Year 4 (2001-2002)

PROBLEM SUMMARY: Applications for funding of all Applicant members of CEBPR, a group of private schools and libraries not affiliated with the Puerto Rico Department of Education, were rejected by the Schools and Libraries Division ("SLD") as untimely filed

because the mailing of the Block 6 Certifications and Item 21 Attachments to the Applications were not postmarked before the end of the Year 4 filing window ending January 18, 2001. After filing an initial Request for Waiver with the SLD that was rejected, CEBPR filed Requests for Review and Waiver (see below) with the Federal Communications Commission (FCC) arguing that the applications should be reinstated for SLD consideration and grant because CEBPR member institutions followed application filing procedures in place during Funding Year 1 through Funding Year 3 permitting applicants to file electronic versions of applications by the close of the filing window and mail the paper copies within several days after the close of the filing window. The SLD's attempt to impose more stringent filing requirements on CEBPR Applicants during Year 4 through informal and unofficial web site publications that were not approved by the Office of Management and Budget ("OMB") violated the Paperwork Reduction Act and the Electronic Signatures in Global and National Commerce Act.

Chronology:

July 2001 – Over six months after the submission of applications with the SLD, CEBPR received Notices from SLD that Applications of 86 of its member institutions were rejected for being late-filed outside the close of the filing window.

August 8, 2001 – CEBPR filed Request for Waiver of Filing Deadline with SLD on behalf of 44 CEBPR member institutions for which it received initial rejections.

August 14, 2001 – Without providing any written decision, SLD rejected CEBPR August 8, 2001 Request for Waiver of Filing Deadline on behalf of 44 CEBPR members.

August 23, 2001 – CEBPR filed Request for Review and Waiver with the FCC on behalf of 42 CEBPR member institutions that received Notices from SLD rejecting applications for being late filed. The Commission has not yet acted on this Request for Review and Waiver.

September 7, 2001 – CEBPR filed second Request for Review and Waiver with the FCC on behalf of 44 CEBPR member institutions that received Notices from SLD rejecting applications for being late filed, for which earlier SLD Request for Waiver was filed. The Commission has not yet acted on this Request for Review and Waiver.

November 28, 2001 – Over 11 months after the submission of applications with the SLD, CEBPR received Notices from SLD that Applications of 54 additional member institutions were rejected for being late-filed outside the close of the filing window

December 27, 2001 – CEBPR filed third Request for Review and Waiver with the FCC on behalf of additional 54 CEBPR member institutions that received Notices from SLD rejecting applications for being late filed. The Commission has not yet acted on this Request for Review and Waiver.

February 28, 2002 – CEBPR filed Supplement to Request for Review and Waiver with the FCC on behalf of all 140 CEBPR member institutions denied funding by SLD.

June 7, 2002 – CEBPR filed with the FCC copy of Presentation made on May 30, 2002 by CEBPR to FCC's Office of General Counsel showing that SLD failed to request OMB approval for new Year 4 filing procedures imposed on CEBPR member applications.

Program Year 5 (2002-2003)

PROBLEM 1 SUMMARY: SLD failed to process and grant Applications timely filed by 62 qualified CEBPR member Applicants for Year 5 funding for unknown reasons. The SLD put all CEBPR member Applicants through a multi-stage selective review process. Even after 62 CEBPR member institutions fully complied with the SLD multi-stage selective review process and demonstrated full compliance with program requirements and qualifications, the SLD failed to issue any funding commitment decision letters to the vast majority of such applicants until November 24, 2003, approximately six months *after* the program year had ended – which denied 49 of the applications (4 were denied in October 2002 as is also discussed below).

Chronology:

May 9, 2001 – SLD forwards Selective Review Request to CEBPR for all CEBPR member Applicants (approximately 120 Applicants) requesting information re CEBPR member institutions effective use of E-Rate funds requested. Approximately 90 CEBPR member institutions complied with this request on a timely basis and submitted responses to SLD (approximately 30 did not have the resources to respond and were forced to drop out of the E-Rate program).

August 9, 2002 – SLD forwards follow-up to May 9, 2001 Selective Review Request seeking more specific information from CEBPR member Institutions re effective use of E-Rate Funds requested. 62 CEBPR member institutions fully and completely complied with this request on a timely basis and submitted responses to SLD (approximately 30 more did not have the resources to respond and were forced to drop out of the E-Rate program).

PROBLEM 2 SUMMARY: 4 out of 62 Applications for Year 5 funding by CEBPR member Applicants that were still pending after the second stage of the SLD's Selective Review Process of CEBPR member institutions were denied funding by SLD for various unsubstantiated reasons. The SLD began denying funding of CEBPR member applications for various reasons as outlined in the Appeals filed by CEBPR (see below), but then discontinued processing CEBPR member applications and issuing further funding commitment decision letters altogether. No Applications have been granted to date.

Chronology:

October 8, 2002 – SLD Funding Commitment Decision letters released to Escuela Evangelica Unida de Fajardo (App. No. 329287), Colegio San Antonio (App. No. 329300), and Colegio Tomas Alva Edison (App. No. 329371) denying funding requests for various unsubstantiated reasons.

December 6, 2002 – CEBPR filed an appeal with SLD on behalf of Escuela Evangelica Unida de Fajardo, Colegio San Antonio, and Colegio Tomas Alva Edison demonstrating that all SLD reasons cited in the funding commitment decision letters to these institutions as justifications for the denial of funding were without merit and that the applications should be reinstated for processing. This appeal has not yet been acted upon by SLD.

December 16, 2002 – SLD Funding Commitment Decision letter released to Biblioteca Publica San Lorenzo (App. No. 329385) denying funding request for various unsubstantiated reasons.

February 12, 2003 – CEBPR filed an appeal with the SLD on behalf of Biblioteca Publica San Lorenzo demonstrating that all SLD reasons cited in the funding commitment decision letter to this institution as justifications for the denial of funding were without merit and that the application should be reinstated for processing. This appeal has not yet been acted upon by SLD.

PROBLEM 3 SUMMARY: All remaining Applications for Year 5 funding by CEBPR member Applicants that were still pending nearly two years after they were filed, and after having complied fully with the SLD's Selective Review Process, were denied funding by SLD for various unsubstantiated reasons. No CEBPR Applications have been granted. Several CEBPR member applications still remain pending at SLD.

Chronology:

November 24, 2003 – SLD Funding Commitment Decision letter released to 49 additional CEBPR member institutions denying funding request for various unsubstantiated reasons.

January 23, 2004 – CEBPR filed a Request for Review with the Commission requesting the Commission reverse SLD's decision denying the funding based on SLD gross errors in processing the applications and interpreting its own rules and policies.

Program Year 6 (2003-2004)

PROBLEM SUMMARY: SLD outright rejected all timely filed applications of CEBPR member institutions (60 institutions) claiming that the funding request numbers (FRNs) are for a request for telecommunications services from a service provider that is not a common carrier.

Chronology:

June 9, 2003 – SLD releases Funding Commitment Decision letters to all CEBPR member institutions (60) that filed applications for Year 6 E-Rate funds rejecting funding of the FRNs related to HITN.

August 6, 2003 – CEBPR filed an appeal with the SLD on behalf of all 60 CEBPR member institutions that received Year 6 funding commitment decision letters denying funding. This appeal establishes HITN is an authorized common carrier and therefore SLD's action in denying the funding to CEBPR institutions was improper and the applications should be immediately reinstated for processing and grant. This appeal has not yet been acted upon by SLD.

Program Year 7 (2004-2005)

HITN was selected by 55 libraries and private schools to provide Internet access, Telecommunications Services and Internal Connections during Program Year 7. Only 77 Forms 470 were filed from the entire Commonwealth of Puerto Rico seeking E-Rate funding for Program Year 7, of which HITN made proposals to 64 such institutions and was selected as the service provider by 55. The vast majority of Puerto Rico schools and libraries stopped applying for E-Rate funding in Year 7 since Puerto Rico has been denied funding over the past three program years.